



Office of the Attorney General
State of Texas

DAN MORALES

ATTORNEY GENERAL

October 15, 1996

Mr. James R. Lindley
General Counsel
Central Texas College
P.O. Box 1800
Killeen, Texas 76540-9990

OR96-1876

Dear Mr. Lindley:

You seek reconsideration of Open Records Letter No. 96-1207 (1996), in which this office determined that chapter 552 of the Government Code required Central Texas College (the "college") to make requested information available to the requestor. We have assigned your request for reconsideration ID# 101374.

We have examined your request for reconsideration. Apparently, the third party whose information was requested, Casa Blanca Tours & Travel, Inc. ("Casa Blanca") believes that this office did not have its information when making its ruling in Open Records Letter No. 96-1207 (1996). It appears that this office did not receive Casa Blanca's March 10, 1996 letter brief regarding its arguments under section 552.110. Therefore, we now consider those arguments.

Casa Blanca states that it furnished its information to the college only "on the basis of non-disclosure." Information is not excepted from disclosure merely because it is furnished with the expectation that it will be kept confidential. *See, e.g.,* Open Records Decision No. 180 (1977). Casa Blanca also argues that the request should be read narrowly to apply only to the final contract as opposed to Casa Blanca's proposal. However, the proposal is expressly made part of the contract and is incorporated by reference into the contract. Therefore, a request for the final contract includes Casa Blanca's proposal.

Section 552.110 excepts from disclosure trade secrets or commercial or financial information obtained from a person and confidential by statute or judicial decision. Casa Blanca argues that portions of its proposal are protected under the second prong of section 552.110. In Open Records Decision No. 639 (1996), this office established that it would follow the federal courts' interpretation of exemption 4 to the federal Freedom of

Information Act in applying the second prong of section 552.110. In *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), the court concluded that for information to be excepted under exemption 4 to the Freedom of Information Act, disclosure of the requested information must be likely either to (1) impair the Government's ability to obtain necessary information in the future, or (2) cause substantial harm to the competitive position of the person from whom the information was obtained. *Id.* at 770. "To prove substantial competitive harm, the party seeking to prevent disclosure must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure." *Sharyland Water Supply Corp. v. Block*, 755 F.2d 397, 399 (5th Cir.), *cert. denied*, 471 U.S. 1137 (1985) (footnotes omitted).¹

We conclude, after reviewing Casa Blanca's arguments and the submitted documents, that the college must withhold the following information as confidential "commercial or financial information" under the second prong of section 552.110: the definition marked on page 6, specification D on pages 13 and 14, the part of section 4.1 that is entitled "During flight and return trips," and Appendix C. The college may not withhold the remainder of the proposal under the second prong of section 552.110.²

Casa Blanca argues that privacy protects the information in Appendix D to its proposal.³ Section 552.101 excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This exception encompasses both common-law and constitutional privacy. For information to be protected from public disclosure under the common-law right of privacy, the information must meet the criteria set out in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The court stated that

information . . . is excepted from mandatory disclosure under Section 3(a)(1) as information deemed confidential by law if (1) the

¹Casa Blanca argues that the college's ability to obtain necessary information in the future would be impaired if we conclude that the proposal must be released. However, as the proposal was submitted in response to a request from the college for bids, we do not believe that the college's ability to obtain similar information in the future will be impaired. See, e.g., *Bangor Hydro-Elec. Co. v. United States Dep't of the Interior*, No. 94-0173-B, slip op. at 9 (D. Me. Apr. 18, 1995) (no impairment because "it is in the [submitter's] best interest to continue to supply as much information as possible" in order to secure better usage charges for its lands); *Racal-Milgo Gov't Sys. v. SBA*, 559 F. Supp. 4, 6 (D.D.C. 1981) (no impairment because "[i]t is unlikely that companies will stop competing for Government contracts if the prices contracted for are disclosed").

²Although Casa Blanca has also argued that parts of its proposal are trade secrets, we have concluded that the college must withhold those portions under the second prong of section 552.110. As Casa Blanca did not argue the trade secret exception for the other parts of its proposal, we need not address the substance of Casa Blanca's trade secret argument.

³We note that the Privacy Act of 1974 applies only to federal agencies.

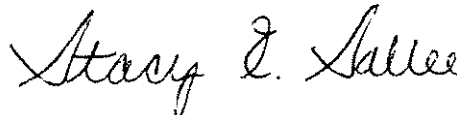
information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public.

540 S.W.2d at 685; Open Records Decision No. 142 (1976) at 4 (construing statutory predecessor to Gov't Code § 552.101). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683.

We have reviewed the information contained in Appendix D and the duplicate information that has not been de-identified. We find nothing in this information that is protected by privacy. Therefore, the college may not withhold any information in Appendix D or the unredacted copies of that appendix under privacy.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

A handwritten signature in cursive script that reads "Stacy E. Sallee".

Stacy E. Sallee
Assistant Attorney General
Open Records Division

SES/ch

Ref.: ID# 101374

Enclosures: Submitted documents

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